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IN THE

Supreme Court of the United States

OCTOBER TERM 1960.

No. 55

UNITED STATES OF AMERICA,
Appellant,
vs.
E. I. DU PONT DE NEMOURS AND COMPANY, GENERAL MOTORS CORPORATION, CHRISTIANA SECURITIES COMPANY and DELAWARE REALTY AND INVESTMENT COMPANY.
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLEES CHRISTIANA SECURITIES COMPANY AND DELAWARE REALTY AND INVESTMENT COMPANY.

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Statement.

Appellant has taken an extraordinary position on this appeal. It is not here asserting that the District Court should have entered the decree which appellant proposed before that court and as to which specific issues were drawn and extensive evidence adduced. It does, however, attack the decree which was entered as inadequate, and criticizes the lower court for not having entered a decree different from any proposed by the parties to the proceedings. Appellant urges that this Court remand the case to the District Court under the single direction that du Pont be

required to divest the legal title to its General Motors stock ratably over a ten-year period by such methods as du Pont may determine subject to approval by the District Court.

The Status of Christiana and Delaware in This Litigation.

Christiana Securities Company (Christiana) and Delaware Realty and Investment Company (Delaware) are stockholders of du Pont, holding in the aggregate approximately 30% of its common stock. Christiana is a publicly held corporation.* As the District Court noted, there are some 4,000 shareholders of Christiana, including many charitable and educational institutions.** The stock is also widely held as an investment by insurance companies (Govt. Ex. 153 (Ex. IV), R. 752, Orig. R. 3131 (not printed)). As at December 31, 1958, the shareholders were distributed among 49 states, the District of Columbia, Hawaii, Canada and several other foreign countries (Chr. Ex. 4, R. 1551, 3075).

Together with du Pont, Christiana and Delaware were originally named as defendants in this action. The allegations were that they had combined and conspired with others in violation of Sections 1 and 2 of the Sherman Act. Du Pont alone was alleged to have violated Section 7 of the Clayton Act. After a full trial the complaint was dismissed as to all defendants.

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* The Boards of Directors of Christiana and Delaware have entered into an agreement to merge the two corporations, subject to stockholder approval and satisfactory tax rulings or opinions of counsel. Both are investment companies registered with the Securities and Exchange Commission.

** R. 3211, 3253. The holdings of 17 such educational institutions alone, as at June 30, 1958, had a market value of $36,025,500 (R. 3225-6). According to a study made as at June 30, 1957 of investments of colleges and universities, Christiana stock was the fourth largest investment in common stocks (Govt. Ex. 70, R. 570, 2682).

On appeal this Court, while not disturbing the findings and conclusions relating to the Sherman Act allegations, held that du Pont had violated Section 7 by its acquisition and retention of General Motors stock. As already indicated there was never any allegation or finding that Christiana or Delaware violated Section 7.

The case was remanded "for a determination after further hearing of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute in conformity with the opinion of this Court" (R. 2). This Court directed that Christiana and Delaware be retained as parties, saying, "It seems appropriate that they be retained as parties pending determination by the District Court of the relief to be granted" (353 U. S. at 608).

Proceedings Before the District Court.

On October 25, 1957 appellant filed a proposed final judgment asking, in addition to relief against du Pont, certain direct relief against Christiana and Delaware. The salient features were:

1. Christiana was to be required to sell through a trustee its directly owned General Motors stock (Arts. III, VII, R. 13, 14-15).

2. Christiana and Delaware were to be required to sell through a trustee the General Motors stock allocable to them as du Pont stockholders whereas other stockholders would have the right to receive and retain their allocable shares (Arts. VI, VII, R. 14-15).

3. Christiana and Delaware were to be subjected to injunctive provisions against acquiring General Motors stock and against having as an officer or director any officer or director of General Motors (Arts. VIII, X, R. 15, 16).

Christiana and Delaware filed objections to the relief requested.* At the opening of the hearings they moved to strike from consideration those provisions of appellant's plan which operated against them (R. 114, 262). The ground of the motion was that Christiana and Delaware were innocent parties, having been charged with and found innocent of violating the Sherman Act and never having been charged with violation of the Clayton Act, and that it was therefore beyond the authority of the court to enter a decree against them without their consent. They recognized, however, that the facts and circumstances relating to their du Pont stockholdings were relevant to the framing of a decree against du Pont. Accordingly, both parties offered to cooperate fully in the hearings to the end that a decree should be entered which protected the legitimate interests of the appellant at the least injury to all concerned (R. 264-

* At the hearings uncontradicted evidence was introduced as to the extent of the losses which would have been suffered by Christiana and Delaware under appellant's proposal. This evidence is summarized in the following table (Chr. Ex. 8, R. 1556, 3084C):

CHRISTIANA AND DELAWARE COMBINED

TOTAL REALIZED LOSS IN ASSET VALUE RESULTING FROM SALE OF G. M. STOCK UNDER GOVERNMENT PLAN AT VARIOUS SALES PRICES FOR G. M. STOCK

	$46 (Present Market)	$41.40 (—10%)	$36.80 (—20%)	$32.20 (—30%)
Present Market Value of G. M. ($46)	$877,247,000	$877,247,000	$877,247,000	$877,247,000
Gross Sales Proceeds at Various Sales Prices	877,247,000	789,522,000	701,798,000	614,072,000
Market Loss	—	87,725,000	175,449,000	263,175,000
Costs of Sales	28,957,000	28,922,000	28,887,000	28,852,000
Dividend Taxes	3,021,000	3,021,000	3,021,000	3,021,000
Capital Gains Taxes	201,182,000	179,260,000	157,337,000	135,415,000
Total Realized Loss in Asset Value	$233,160,000	$298,928,000	$364,694,000	$430,463,000

5). The motion was taken under advisement until the termination of the proceeding.

The Judgment of the District Court.

The District Court concluded that it was desirable to include in the decree certain provisions directed to Christiana and Delaware. While it did not decide whether it would have the authority to direct a sale by these corporations, the primary relief then requested against them, the court concluded that it did have the power to "grant certain kinds of ancillary relief against these two corporations" (R. 3194). The principal provisions directed against Christiana and Delaware were:

1. Christiana, Delaware, their officers and directors and members of their immediate families were enjoined from voting any General Motors stock in any capacity (Sec. VI, R. 3304). This had the effect of disenfranchising all General Motors stock owned directly by Christiana, Delaware, and their officers and directors (including members of their immediate families) as well as the General Motors stock owned by du Pont which was allocable to this group.

2. Christiana and Delaware were enjoined from acquiring any additional General Motors stock (Sec. III, R. 3301-02).

3. Christiana and Delaware were enjoined from having as an officer or director any officer or director of General Motors (Sec. IV, R. 3302).

Both Christiana and Delaware specifically consented to the provisions of the decree directed against them (R. 3269).

Position of Christiana and Delaware on this Appeal.

(1) As to any specific relief against Christiana and Delaware

In view of the position which appellant has taken in its brief, it is our understanding that no specific issues as to

Christiana and Delaware are now before the Court. Appellant has not asserted that any different or further relief should be directed against these appellees if du Pont is permitted to retain legal title to its General Motors stock as provided by the decree of the District Court. Similarly, appellant is not now raising an issue as to any particular form of relief against Christiana and Delaware in the event du Pont were required to dispose of such legal title.

Presumably it is for this reason that appellant has refrained from raising the issue whether Christiana and Delaware should be subjected to an order of sale. Whether such a question would ever become relevant and if so, the factual context in which it should be decided, would have to await further proceedings and is obviously premature.* On this understanding of appellant's position there will be no discussion here of the position of Christiana and Delaware that under no circumstances may they be subjected to provisions other than those to which they have specifically consented. This position is founded upon the fundamental proposition that no court has authority to enter a judgment against any party without his consent unless a cause of action has been alleged and established against him.**

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* In this connection it may be noted that legislation introduced in the last Congress relating to mitigation of taxes on distributions under antitrust decrees would extend such relief, under certain circumstances, to distributions by corporations, such as Christiana and Delaware, of stock received pursuant to such decrees. H. R. 8126, 86th Cong., 1st Sess. (1959); H. R. 5547, as reported by Senate Finance Committee, S. Rep. No. 1767. 86th Cong., 2d Sess. (1960).

** See *Windsor* v. *McVeigh*, 93 U. S. 274, 282 (1876); *Standard Oil Co.* v. *Missouri*, 224 U. S. 270, 281-2 (1912); *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 403 (1945); *United States* v. *National Lead Co.*, 332 U. S. 319, 351-2 (1947); and *Sylvan Beach, Inc.* v. *Koch*, 140 F. 2d 852, 861-2 (8th Cir. 1944).

(2) As to general relief against du Pont.

The crucial issue posed by appellant is whether the du Pont Company should be required to dispose of its remaining interest in General Motors stock, namely, the bare legal title shorn of all rights to participate in the management or to vote that stock. Appellant contends that anything short of this requirement is inadequate to eliminate the effects which this Court found to be offensive to the Clayton Act, and that therefore no amount of injury to the stockholders of du Pont and General Motors can outweigh the necessity for such relief. The District Court, after weeks of hearings and in a carefully reasoned opinion, found that the decree which is now before this Court was fully effective to eliminate the "effects of the acquisition offensive to the statute," and that even though the decree proposed by appellant would likewise have been effective, it would have resulted in substantial injury to innocent parties—the stockholders of du Pont and General Motors.

There is no dispute that the decree proposed by appellant to the District Court would have resulted in substantial injury to the stockholders of du Pont and General Motors.* Such differences as there are on this issue are merely differences of degree. There can also be no dispute that any decree which would require du Pont to dispose of its legal title would result in substantial injury, the differences again being merely as to the extent of the injury.

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* It should be pointed out that the losses which would be suffered by Christiana as a result of the requirement of forced sale would fall equally upon all its shareholders, including charitable and educational institutions. Even if it be assumed that the General Motors stock could be sold at the price which prevailed at the time of the hearings ($46), the total loss to Christiana would be $212,500,000. This is equivalent to an impost of $1,416.67 on every outstanding share, whether held by educational institutions or other tax-exempt charities or not. (Chr. Ex. 6, R. 1556, 3084A; Govt. Ex. 602, R. 2433, 2929).

Therefore, the fundamental questions upon which this appeal should turn are (1) whether the decree of the District Court is adequate to effectuate the purposes of Section 7, and (2) if so, whether the alternative proposed by appellant should be rejected because of the injury which it would impose upon the stockholders of du Pont and General Motors. Christiana and Delaware as stockholders of du Pont subscribe fully to the views set forth in detail in the brief filed on behalf of the du Pont Company. It would be an imposition upon the Court to reiterate the views there expressed.

There are two points, however, which these appellees wish to emphasize. One relates to the voting provisions of the decree. The District Court was correct in regarding as highly speculative any likelihood of unified action by du Pont stockholders to influence the General Motors management to favor du Pont. However, if this Court should feel that the voting provisions of the decree give rise to some question, this can be very simply remedied without resorting to the drastic relief demanded by appellant. For example, this Court could direct a modification of the decree which would extend the prohibition against voting General Motors stock to all du Pont stockholders and, to meet the corporate requirements of General Motors, direct that the stock owned by du Pont should be voted in exactly the same proportions as the vote of all other General Motors stockholders. Thus, even if appellant's fears as to the voting provisions should be thought to have some basis, these fears call for a remedy far short of complete divestiture of ownership.

The other point which should be emphasized relates to the hypothetical nature of appellant's objections. Against the speculative fears advanced by appellant there should be weighed the opportunity to test the efficacy of the decree by actual performance. This opportunity results from the

special provision the District Court inserted in the decree (in addition to the usual retention of jurisdiction provision) that any party may come into court for a modification of the decree should it not prove effective in any respect (Sec. IX, R. 3309-10). The decree has been in force for well over a year, during which period one annual meeting of stockholders of General Motors has been held. The report of the Monitor appointed by the District Court (a copy of which has been filed with this Court) states in substance that the provisions of the decree were carried out, that no forbidden person voted and that no one was nominated or elected as a General Motors director at the behest or suggestion of du Pont. No instance has been pointed out by appellant, showing that the decree has not worked effectively or that du Pont has exercised any influence over the purchasing policies of General Motors. It would not seem reasonable to accept the speculative fears of appellant as a basis for subjecting the stockholders of du Pont and General Motors to serious loss when the less drastic decree can be tested and, if not effective, changed at any time.

Conclusion.

The judgment below should be affirmed.

Respectfully submitted,

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